Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Appropriate Framework for Broadband Access To the Internet Over Wireline Facilities	)	**CC Docket No. 02-33**
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provisions of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	**CC Docket Nos. 95-21, 98-10**

COMMENTS OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

ASSOCIATION OF COMMUNICATIONS ENTERPRISES
Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group, P.C.
1424 16th Street, N.W.
Suite 105
Washington, D.C. 20036
(202) 293-2500

May 2, 2002 **Its Attorneys**

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Appropriate Framework for Broadband Access To the Internet Over Wireline Facilities	)	**CC Docket No. 02-33**
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provisions of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	**CC Docket Nos. 95-21, 98-10**

COMMENTS
OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R.§ 1.415, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 02-42, released February 15, 2002, in the captioned proceeding ("*NPRM*"). In the *NPRM*, the Commission seeks comment on "the appropriate legal and policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities," remarking that

[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

"[t]he classification of wireline broadband Internet access services . . . raises challenging legal, regulatory, and policy questions resulting from unique issues associated with these capabilities, including differing market and technical characteristics, and the fact that broadband technologies may ultimately replace legacy narrowband networks."[2]

The *NPRM* seeks to explore both the appropriate statutory classification of self-provisioned wireline broadband Internet access services and the regulatory requirements that should be applied to such self-provisioned services, particularly when provided by incumbent local exchange carriers ("LECs"), as well as the universal service contribution obligations such services should bear. In a surprising, and highly disturbing, twist, the *NPRM* also asks for comment not only on the regulatory framework that should be applicable to "broadband transmission [provided] on a stand-alone basis, without a broadband Internet access service,"[3] but the appropriate statutory classification of such stand-alone broadband transmission, a matter which has long been settled. ASCENT will address these latter issues initially, and then discuss certain of the principal matters identified by the *NPRM*.

---

2 NPRM, FCC 02-42 at ¶¶ 1, 13.

3 Id. at ¶ 26.

1. The Commission Cannot Override Congress by Regulatory Fiat.

   1. The Communications Act Allows No Interpretation Other Than That Broadband Services are Telecommunications Services.

The *NPRM* asks "[c]ommenters . . . [to] address the appropriate statutory classification of broadband transmission . . . when it is not coupled with the Internet access component."[4] As the *NPRM* acknowledges, this matter has been long settled. The provision of broadband transmission on a stand-alone basis is a "telecommunications service." The only way to hold otherwise is to rewrite the Communications Act of 1934, as amended ("Communications Act"), which the Commission, whatever its objectives, cannot do.

[4] Id.

A "telecommunications service" is "the offering of . . . ['transmission, between or among points specified by the user of information of the users' choosing, without change in the form or content of the information as sent and received'] for a fee directly to the public, or such classes of users as to be effectively available directly to the public, regardless of the facilities used."[5] "Advanced telecommunications capability" is defined, "without regard to transmission media or technology," as "high-speed, switched, broadband *telecommunications* capability that enables users to originate and receive high-quality voice, data, graphics, and video *telecommunications* using any technology."[6] "Today's broadband services include services based on digital subscriber line technology (commonly referred to as xDSL) . . . and services based on packet-switched technologies."[7] As the Commission has acknowledged, "xDSL and packet switching are simply transmission technologies," providing "a transparent, unenhanced transmission path," and, therefore, when "offered for a fee directly to the public, . . . [broadband services are] 'telecommunications services'."[8]

---

5 47 U.S.C. § 153(48), (50).

6 47 U.S.C. § 157 note (*emphasis added*).

7 In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237, ¶ 1, fn. 2 (1999) (*subsequent history omitted*).

8 In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶¶ 35, 36 (1998) (*subsequent history omitted*). "[A]dvanced services offered by incumbent LECs are telecommunications services, by the plain meaning of the Act." Id. at ¶ 60. *See also* Association of Communications Enterprises v. FCC, 235 F.3d 662, 664 (D.C. Cir. 2001) ("The Commission determined that advanced services are telecommunications services like any others . . . As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services."); In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 5 ("[W]e determined that by the plain terms of the Act, advanced services offered by incumbent LECs are telecommunications services.").

The Commission "has repeatedly held that specific packet-switched services are 'basic services,' that is to say pure transmission services."[9] As described by the Commission, packet-switched services, such as, for example, frame relay service[10] "offer[] a transmission capability that is virtually transparent in terms of . . . [their] interaction with customer-supplied

[9] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 35.

[10] The Commission has included frame relay service among the services based on packet-switched technology which are denominated "advanced services." Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Controlling Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules (Memorandum Opinion and Order) 14 FCC Rcd. 14712, 363, fn. 671 (1999) (*subsequent history omitted*).

data."[11] Indeed, packet-switched services are "designed to transport customer data transparently through the network."[12]

As the Commission has aptly pointed out, so clear is it that broadband services are "telecommunications services" when offered directly to the public for a fee that no party has argued to the contrary.[13] The sole definitional debate surrounding the proper statutory classification of broadband services was whether they constituted "local exchange service" or "exchange access." This debate arose in the context of a tariff filing by GTE Telephone Operators of a DSL service offering the carrier described as "an interstate data special access service that provides a high speed

---

[11] Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service (Memorandum Opinion and Order), 10 FCC Rcd. 13717, ¶ 34 (1995).

[12] Id.

[13] Id. at ¶ 36.

access connection between an end user subscriber and an Internet Service Provider (ISP) by utilizing a combination of the subscriber's existing local exchange physical plant (*i.e.*, copper facility), a specialized DSL-equipped wire center, and transport to the network interface, for example, the frame relay switch, where the ISP will connect to GTE's network."[14]

[14] GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (Order Designating Issues for Investigation), 13 FCC Rcd. 15645, ¶ 1 (1998) (*subsequent history omitted*).

While the investigation of that tariff filing culminated in a ruling that the GTOC DSL service was a special access service "properly tariffed at the federal level"[15] -- *i.e.*, a "telecommunications service" -- the debate raged on in the context of various petitions filed by former Bell Operating Companies ("BOCs") urging the Commission to forbear from applying Section 251(c) unbundling and resale requirements to advanced services. Each of these forbearance petitions explicitly or implicitly acknowledged that broadband services are "telecommunications services."[16] And while one carrier contended in subsequent comments that the terms "local exchange service" and "exchange access" "refer[red] only to local circuit-switched voice telephone service or close substitutes, and the provision of access to such services," the Commission responded that "[n]othing in the statutory language or legislative history limits these terms to the provision of

---

[15] GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (Memorandum Opinion and Order), 13 FCC Rcd. 22461, ¶¶ 1, 16, 25 (1998) (*subsequent history omitted*).

[16] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶¶ 23, 25, 27.

voice, or conventional circuit-switched service."[17] Indeed, the Commission declared, "[t]he plain language of the statute refutes any attempt to tie these statutory definitions to a particular technology."[18]

---

17 Id. at ¶ 41.

18 Id.

In short, the *NPRM* now suggests as a possibility a statutory reading not even urged by the BOCs and other proponents of deregulation of incumbent LEC provision of broadband services. While the Commission's powers are broad, they are not limitless. The Commission's "discretion cannot include the power to rewrite a statute and reshape a policy judgment Congress itself has made."[19] "Where the language Congress chose to employ is clear," it must be "followed and given effect."[20] The Commission is bound by "the tie that binds it to the text Congress enacted," its authority to act coming "from Congress, not from . . . the Commission's own conception of how the statute should be rewritten in light of changed circumstances."[21]

Here, the meaning of the statute is clear. Broadband services are "telecommunications services." If the Commission desires to reclassify them as something else, it "must take its case to Congress," not legislate through regulation.[22]

---

[19] Natural Resources Defense Counsel v. Administrator, U.S. Environmental Protection Agency, 902 F.2d 962, 977 (D.C. Cir. 1990); Louisiana Public Service Comm'n. v. Federal Communications Commission, 476 U.S. 355, 376 (1986).

[20] Wisconsin Electric Power Co. v. Department of Energy, 778 F.2d 1, 4 (D.C. Cir. 1985).

[21] MCI Telecommunications Corp. v. Federal Communications Commission, 765 F.2d 1186, 1194 - 95 (D. C. Circuit 1985); United States v. Calamaro, 354 U.S. 351, 357 (1957).

[22] Southwestern Bell Corp. v. Federal Communications Commission, 43 F.3d 1515, 1519 (D.C.Cir. 1995).

2. The Concept of "Private Carriage" Cannot be Used to Relieve Incumbent LECs of Statutory Requirements.

The *NPRM* queries whether the concept of "private carriage" could be utilized to relieve incumbent LECs of regulatory oversight and obligations in their provision of broadband services. Indeed, the *NPRM* asks whether a carrier could offer broadband services to some as private carriage, while offering such services to others under tariff. The simple answer is that the Commission may not utilize the concept of "private carriage" to relieve incumbent LECs of statutory requirements.

"A carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with customers."[23] Nor can the Commission utilize concepts of private carriage to avoid Congressional mandates. Initially, an Incumbent LEC could not withdraw specific facilities or any portion of its facilities from common carriage without first securing authority pursuant to Section 214 of the Communications Act for such withdrawal.[24] And any such authority would have to be based on "a showing that the withdrawal . . . [would] not have a significant detrimental effect upon common carrier service – *i.e.*, that needed common carrier service . . . [would] remain available" – a showing that could not be made unless broadband services were also

[23] Southwestern Bell Telephone Company v. Federal Communications Commission, 19 F.3d 1475,1481 (D. C. Cir. 1984); Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service (Memorandum Opinion and Order), 10 FCC Rcd. 13717 at ¶ 52.

[24] 47 U.S.C. § 214. The same facilities obviously cannot be used to provide both common and private carriage. Southwestern Bell Telephone Company v. Federal Communications Commission, 19 F.3d 1475 at 1480 - 81.

being offered on a common carrier basis.[25]

Provision of broadband services by means of private carriage would also create a direct conflict with Sections 272(c)(1) and (e)(4) of the Communications Act.[26] Both provisions impose strict nondiscrimination obligations on the former BOCs. These nondiscrimination obligations constitute a legal obligation to make telephone exchange service and exchange access

---

[25] Competition in the Interstate Interexchange Marketplace (Notice of Proposed Rulemaking), 5 FCC Rcd. 2627, ¶ 142 (1990) (*subsequent history omitted*).

[26] 47 U.S.C. §§ 272(c)(1), 272(e)(4).

provided to or by a BOC to itself or its affiliates available to any other requesting carrier. Such general availability, of course, is a hallmark of common carriage.[27]

Moreover, a carrier is not necessarily engaged in private carriage simply because it offers service to a select group of customers -- *e.g.*, ISPs. As the U.S. Court of Appeals for the District of Columbia Circuit has held, an entity can qualify as a common carrier even if "the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.[28] As characterized by the Court, the key factor is that the carrier serve "whatever public its service may legally and practically be of use" -- *i.e.*, the universe of interested ISPs.[29]

Finally, characterizing the provision by incumbent LECs of broadband services as private carriage flies in the face of Section 160 of the Communications Act. Section 160 precludes the Commission from forbearing from application of Section 251(c) and Section 271 until such time as it has determined that those sections have been "fully implemented."[30] Allowing incumbent LECs to avoid their network unbundling and resale obligations by classifying incumbent LEC provision of broadband service as private carriage would achieve the same result as forbearance.

---

[27] National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 525 F.2d 630, 641 (D.C. Cir. 1976) (*subsequent history omitted*).

[28] Id. at 641.

[29] Id.

[30] 47 U.S.C. § 160.

And the U.S. Court of Appeals for the District of Columbia Circuit has made clear that the Commission cannot lawfully do indirectly that which it is from forbidden by Congress from doing. As emphasized by the Court, such an action, even without explicit invocation by the Commission of its forbearance authority, would nonetheless constitute "circumvention of the statutory scheme."[31]

2. The Commission Should Revisit Its Ruling That Broadband Services "Designed" for ISPs are Not Retail Offerings.

The *NPRM* asks whether "[i]f xDSL is being offered on a wholesale basis as an input to ISPs' information services, it is being offered 'directly to the public'." While the issue is being posed in the context of the Commission's queries about private carriage classification of broadband services, it nonetheless also raises anew the issue of whether the Commission should revisit its holding that a broadband service designed for ISPs "as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering,"[32] and hence, not subject to Section 251(c)(4)'s resale requirements.[33] ASCENT submits that revisiting this matter is appropriate

31 Association of Communications Enterprises v. FCC, 235 F.3d 662 at 666.

32 In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 19.

33 47 U.S.C. ¶ 251(c)(4).

at this juncture given that a fundamental predicate of the Commission's determination has proven to be false.

In undertaking its analysis of whether Section 251(c)(4) applied to incumbent LEC provision of broadband services "without regard to their classification as telephone exchange or exchange access," the Commission recognized that the analysis would "require[] a fact specific evaluation of the features and characteristics of a particular transaction."[34] "Based on the record before [it]," the Commission while concluding that broadband services "sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service," nonetheless held that "section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service."[35]

In reaching this latter conclusion, the Commission acknowledged that "it . . . [was] not clear how the Commission should interpret the term ['at retail']." Uncertainty prevailed because "[t]he Act . . . [did] not define the term 'at retail,' and the legislative history on section 251(c)(4) provide[d] only minimal clarification of Congress' intentions with regard to the appropriate

---

34 Id. at ¶ 3.

35 Id. at ¶¶ 3, 19.

definition and application of the term."[36] Indeed, the Commission acknowledged that "the legislative history suggests that the Commission should interpret section 251(c)(4) in such a way as to create affordable resale opportunities in order to stimulate the development of local competition."[37]

---

[36] Id. at ¶ 11.

[37] Id.

The Commission nonetheless removed broadband services provided primarily to ISPs from the ambit of Section 251(c)(4) in significant part because it believed that it had struck an appropriate balance between the "primary objective of section 251: opening the local exchange market to competition in all services to ensure that consumers reap the benefits of broad-based and long-lasting competition" through, among other things, "[resale of] incumbent's services at wholesale rates," and the "section 706 . . . complementary goal of facilitating investment and deployment of innovative technologies, specifically, those that provide advanced telecommunications capabilities, to all consumers."[38] The balance struck by the Commission, however, presumed a retail offering by the incumbent LECs of broadband services. As the Commission explained, its "findings reinforce[d] the resale requirement of the Act by *ensuring* that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates, thus ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs."[39]

Unfortunately, the ability of competitive carriers to enter the advanced services market by providing to consumers through resale the same quality service offerings provided by incumbent LECs has been consistently thwarted by strategic manipulation by incumbent LECs of their broadband service offerings. Incumbent LECs such as SBC Communications Inc. ("SBC") have denied broadband resale opportunities altogether by limiting their DSL offerings to

---

38 Id. at ¶ 18.

39 Id. at ¶ 20.

“wholesale”

services provided to ISPs and "retail" services bundled with Internet access.[40] Accordingly, the

[40] Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Arkansas and Missouri (Memorandum Opinion and Order), 16 FCC Rcd. 20719, ¶¶ 81 - 82 (2001) (*subsequent history omitted*). Other incumbent LECs like Verizon have so restricted their retail offerings of resold DSL service so as to render them ineffective as a competitive tool in the marketplace. Verizon initially sought to limit resale of DSL services to lines on which it provided voice service, and while the carrier ultimately relented and offered DSL services for resale in conjunction with resold voice lines, it continues to block the use of resold DSL service in conjunction with the UNE-Platform, the only vehicle through which it can be offered on an economically viable basis to the mass market. Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service

balance the Commission thought it had struck has never been realized.

---

in Connecticut (Memorandum Opinion and Order), 16 FCC Rcd. 14147, ¶ 31 (2001) (*subsequent history omitted*); Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Pennsylvania (Memorandum Opinion and Order), 16 FCC Rcd. 17420, ¶ 95 (2001) (*subsequent history omitted*).

In order to achieve a meaningful balance between the goals of Section 251(c)(4) of the Communications Act and Section 706 of the Telecommunications Act of 1996 ("Telecommunications Act"), the Commission should revisit its classification of broadband services provided to ISPs as "wholesale" services. As noted above, there is ample flexibility within the Communications Act to allow for such action, given that the term "at retail" is not defined and the legislative history "suggests that the Commission should interpret section 251(c)(4) in such a way as to create affordable resale opportunities in order to stimulate the development of local competition."[41] If indeed Congress did "not consider[] how 'at retail' should be construed in the context of the sale of data services to Internet Service Providers as an input component to their information service offerings to the ultimate end-user," as the Commission has suggested, the Commission is free to "interpret section 251(c)(4) in such a way as to create affordable resale opportunities in order to stimulate the development of local competition."[42] Such a reading would finally give the term "'at retail' . . . meaning consistent with the primary objective of section 251: opening the local exchange market to competition in all services to ensure that consumers reap the benefits of broad-based and long-lasting competition."[43]

---

[41] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 11.

[42] Id.

[43] Id. at ¶ 18. There exists ample support in the record in CC Docket No. 98-147 for the Commission to conclude that broadband services provided to ISPs are provided "at retail," and that such a holding is consistent with Commission treatment of like circumstances, such as the agency's treatment of services provided by incumbent LECs to independent payphone service providers. *See, e.g.,* "A White Paper: Resale of Advanced Telecommunications Services Pursuant to Section 251(c)(4)," submitted by letter from Ernest B. Kelly, III, President, Telecommunications Resellers Association, to William E. Kennard, Chairman, Federal Communications Commission in CC Docket No. 98-147 on April 27, 1999; "A White Paper: Competition in the Residential DSL Market will be Jeopardized Unless the FCC Requires Incumbent LECs to Provide DSL Volume Discount Plans to Carriers at a Wholesale Price," submitted by letter from Rodney L. Joyce, Counsel to Network Access Solutions Corp. to Magalie Roman Salas, Secretary, Federal

III. The Commission Should Promote Local Telephone And Broadband Competition by Facilitating Resale Of Broadband Services.

Communications Commission in CC Docket No. 98-147 on May 5, 1999.

The *NPRM* poses a variety of questions regarding both the statutory classification of wireline broadband Internet access services and the regulatory framework that should be applied to such services. ASCENT urges the Commission in addressing these critical matters to remain fully grounded in the intent of Congress in enacting the Telecommunications Act. While speeding the deployment of broadband facilities and the availability of advanced services is an important and laudable goal, it was neither the exclusive, nor the pre-eminent, Congressional objective in amending the Communications Act. The principal goal to be achieved through such legislative action was the opening of all telecommunications markets to competition, and, in particular, the "fostering [of] competition in both the interexchange and local exchange markets."[44] Any actions taken by the Commission with respect to broadband Internet access services provided by incumbent LECs over self-provided transmission facilities must not be inconsistent with, and, indeed, should further, these Congressional ends. As Commissioner Copps has duly noted, "setting competition policy is the exclusive jurisdiction of Congress" and it is not for the Commission to "question [-- much less remake --] the statutory competitive framework."[45]

---

[44] Southwestern Bell Telephone Company v. Federal Communications Commission, 153 F.3d 597 (8th Cir. 1998).

[45] Separate Statement of Michael J. Copps released in CC Docket No. 01-338 on December 12, 2001.

As described by the Commission, "Congress sought to foster . . . [local] competition by fundamentally changing the conditions and incentives for market entry and by attempting to open any remaining local service bottlenecks."[46] "[B]ecause of the central importance of the requirements in section 251(c) and 271 to opening local markets to competition," these provisions are the "cornerstones of the framework Congress established in the 1996 Act."[47] Indeed, Sections 251(c) and 271 "provide the blueprint . . . for ensuring that all markets are open to competition."[48] So central were Sections 251(c) and 271 to realization of Congressional goals that the Commission was directed to encourage the deployment of advanced telecommunications capability principally by "promoting competition in the telecommunications market" – *i.e.,* through implementation and enforcement of Sections 251(c) and 271.[49]

The Commission must thus classify and regulate Internet access services provided by incumbent LECs over their own broadband facilities in a manner designed to foster competition

---

[46] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶ 253 (1999) (*subsequent history omitted*).

[47] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 76.

[48] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 1.

[49] 47 U.S.C. § 157 note.

in the local market. This end can be achieved most effectively and most simply by requiring incumbent LECs who provide broadband Internet access services using self-provided transmission facilities to unbundle the transmission component and offer it separately to competitive providers. Alternately, the Commission could classify the self-provided transmission component of broadband Internet access service as a "telecommunications service."

1. Incumbent LECs Should be Required to Unbundle, and Offer Separately, the Transmission Component of Their Broadband Internet Access Services.

Requiring incumbent LECs to unbundle, and make available for Section 251(c)(4) resale the transmission component of the broadband Internet access services they provide to end-users over their own network facilities is not only fully in accord with, but required by, Section 251(c)(4). Section 251(c)(4) requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[50] Recognizing that incumbent LECs possess market power, "Congress prohibited unreasonable restrictions on resale."[51] As the Commission explained, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."[52] "In a competitive market," the Commission continued, "an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers

---

50 47 U.S.C. § 251(c)(4).

51 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 939 (1996) (*subsequent history omitted*).

52 Id.

turn to other sellers."[53] Hence, the Commission recognized, resale restrictions or conditions would likely have "anticompetitive results."[54]

[53] Id.

[54] Id. at ¶ 939.

The Commission also recognized that efforts would be made by incumbent LECs to avoid their Section 251(c)(4) obligations by strategic manipulation of their product offerings. In rejecting incumbent LEC calls for creation of a general exemption "for all promotional or discount service offerings made by incumbent LECs," the Commission declared that "[a] contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[55] And when the Commission carved out a limited exemption for "short-term promotions," it imposed strict conditions to "preclude the potential for abuse."[56] Nevertheless, the Commission continued to express concern that "conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition," and looked to state commissions to help it in policing against such abuses.[57]

Later, when BellSouth Corporation ("BellSouth") attempted to justify its refusal to make customer-specific contract service arrangements ("CSAs") available for Section 251(c)(4) resale, the Commission again recognized the potential for, and acted to thwart, abuse. Noting that BellSouth had "filed more than twice as many CSAs in 1997 (141) as it did in 1996(66), thus insulating a substantial portion of its market from resale competition," the Commission concluded that its concern that carriers would seek to avoid their statutory resale obligations "by shifting customers to nonstandard offerings" had been realized.[58] As described by the Commission,

---

[55] Id. at ¶ 948.

[56] Id. at ¶ 950.

[57] Id. at ¶ 952.

[58] Application of BellSouth Corporation, *et al* .Pursuant to Section 271 of the Communications

"BellSouth thus appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs . . . [thereby] prevent[ing] resellers from competing for large-volume customers, . . . hindering local exchange competition."[59]

Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539, ¶¶ 215 - 24 (1997) (*subsequent history omitted*).

[59] Id. at ¶ 224.

When incumbent LECs bundle their self-provided DSL services with Internet access service and cease to offer stand-alone DSL service to the public, they are engaging in the same avoidance stratagems the Commission has previously decried. They are shifting customers to services they believe fall outside the ambit of Section 251(c)(4) for the purpose of avoiding their statutory resale obligations. And in so doing they are eviscerating the resale provisions of the Communications Act and hindering competition.

The Commission has not heretofore turned a blind-eye to such machinations and it should not do so now. If the Commission desires to relieve incumbent LECs from their Section 251(c)(4) obligations as they relate to broadband services, Congress has provided it with a mechanism to do so in Section 160 of the Communications Act. In order to exercise Section 160 forbearance authority, however, the Commission must first find that Section 251(c) has been fully implemented, which it cannot do because full implementation has not yet occurred. The Commission should not, indeed, cannot, engage in backdoor forbearance through regulatory sleight of hand.[60]

[60] Association of Communications Enterprises v. FCC, 235 F.3d 662 at 666 ("[T]o apply § 251(c) as narrowly as the Commission has is akin to forbearing from regulation.").

Congress having prohibited it from relieving incumbent LECs of their Section 251(c)(4) resale obligations until Section 251(c) has been fully implemented and the forbearance standard satisfied, the Commission cannot engage in the legal and practical equivalent of forbearance without heed to Section 160. The Commission "may not accomplish indirectly that which . . . it may not do directly."[61] Where Congress has expressly prohibited an action, the Commission may not seek to accomplish the prohibited action by artifice. Moreover, "[i]t is the substance of what the [Commission] . . . has done which is decisive;"[62] if "the substance of the decision" differs from the label affixed by the agency to the action, it is the former, not the latter, that Courts will look to in assessing the lawfulness of the action.[63]

This problem is easily resolvable by applying to broadband Internet access services provided by incumbent LECs on self-provided facilities, a variation of the unbundling requirements

---

[61] Iowa Utilities Board v. Federal Communications Commission, 135 F.3d 535 (8th Cir. 1998) *(subsequent history omitted)*.,

[62] Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C.Cir. 1983) (*quoting* Regular Common Carrier Conference v. United States, 628 F.2d 248, 251 (D.C.Cir. 1980), and Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942)).

[63] Action for Children's Television v. FCC, 852 F.2d 1332, 1337 (D.C.Cir. 1988) (*quoting* Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101, 105 (D.C.Cir. 1987)); American Telephone and Telegraph Company v. FCC, 449 F.2d 439 (2d Cir. 1971); American Telephone and Telegraph Company v. FCC, 487 F.2d 865 (2d Cir. 1973).

imposed in the *Second and Third Computer Inquiries*. Incumbent LECs should be required to unbundle and offer to competitive providers pursuant to Section 251(c)(4), as well as to non-affiliated ISPs pursuant to tariff in accordance with *Second and Third Computer Inquiries* unbundling requirements, the broadband transmission services through which they deliver Internet access service. Contrary to the suggestion of the *NPRM*, such unbundling is even more appropriate now than was the more unlimited unbundling mandated in the *Second and Third Computer Inquiries*, because it is consistent with express Congressional mandates..

In its *Third Computer Inquiry*, the Commission explained that the unbundling obligations, among other nonstructural safeguards, "were designed to serve the dual goals of permitting carriers to make enhanced services available to the public in the most efficient manner, while promoting the continued development of competition in the enhanced service marketplace."[64] Critically, the Commission noted that "achievement of the latter goal could be jeopardized if, in furtherance of the former goal, a carrier were permitted to offer an efficient enhanced service integrated with its basic network facilities, while withholding from its competitors the opportunity to interconnect similar services with its network on a comparably efficient basis."[65] Unbundling, among other nonstructural safeguards, was, the Commission continued, "designed to prevent carriers from engaging in such conduct, which could unnecessarily reduce the opportunities for non-carriers to participate in the enhanced service marketplace and thereby deprive the public of the benefits of competition in this area."[66]

---

64 Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) (Report and Order), 104 F.C.C.2d 958, ¶ 1287 (1986) (*subsequent history omitted*).

65 Id.

66 Id.

Section 251(c) was designed to do precisely the same thing for carriers seeking to provide competitive service alternatives in the local telecommunications market. Like the *Second and Third Computer Inquiries* unbundling requirements, Section 251(c) "serve[s] to safeguard against access discrimination and to promote competition and market efficiency," but in the local exchange/exchange access market rather than in the information services market.[67] Requiring incumbent LECs to unbundle the transmission component of broadband Internet access service and make it available to both ISPs and carriers would provide a complementary function, extending the benefits of competition to both local telecommunications and information services markets.

That both unbundling requirements remain necessary is confirmed by the continued control exercised by incumbent LECs over "bottleneck" network facilities. Not only do incumbent LECs retain a share of the local telephone market in excess of 90 percent,[68] they control physical connectivity to an even greater percentage of customers -- *i.e.*, not only those customers they serve, but those customers served by competitors through resale, the UNE-Platform, and UNE loops. In short, the incumbent LEC control of the facilities that prompted the *Second and Third Computer Inquiries* unbundling requirements has diminished only marginally. The other "network platforms"

---

[67] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services (Further Notice of Proposed Rulemaking), 13 FCC Rcd.6040, ¶ 78 (1998).

[68] Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001, p. 1 (February 2002).

touted by the *NPRM* – *i.e.*, "cable, wireless and satellite"[69] – are neither sufficient evolved, deployed, available, affordable and/or open to diminish in any material respect the importance of the connectivity provided by incumbent LECs to either local telecommunications or information services competition.

---

[69] NPRM, FCC 02-42 at ¶¶ 36 - 37.

As the *NPRM* notes, the Commission acted in its *Second Computer Inquiry* because it feared that carriers would "favor their own data processing activities by discriminatory services, cross-subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities."[70] The incumbent LECs' manipulation of their broadband service offerings to avoid their Section 251(c)(4) resale obligations is an indication that these concerns remain as real today. To paraphrase the Commission, the ability of incumbent LECs to impose resale restrictions and conditions evidences continued market power, exercisable by incumbent LECs to preserve their market position.

2. The Self-Provided Transmission Component of an Incumbent LEC's Broadband Internet Access Service Should be Classified as a "Telecommunications Service."

An alternative means of balancing the Congressional goals embodied in Section 251(c) of the Communications Act and Section 706 of the Telecommunications Act would be to classify the transmission component of an incumbent LEC's self-provisioned broadband Internet access services as a "telecommunications service" to which the resale obligations of Section 251(c)(4) would attach. The sole basis articulated by the *NPRM* for tentatively concluding that self-provisioned incumbent LEC broadband access service is an information service, rather than an information service and a telecommunications service, is the view that broadband Internet access service must be viewed "as a single integrated offering to the end user.[71] It is not at all clear that

[70] Id. at¶ 38.

[71] Id. at¶ 21.

this view is a reasonable, much less the only, or best, interpretation of the statute.

The view articulated by the *NPRM* appears to be predicated on the reference in the statutory definition of "information services" to the provision of enhanced capabilities "via telecommunications," and the reference in the statutory definition of "telecommunications services" to the absence of "change in the form or content of the information as sent and received."[72] The *NPRM* reads these references as representing a Congressional recognition that "a transmission component is embedded within, and not separate and distinct from, the information service."[73] In short, according to the *NPRM*, Congress codified the Commission's "contamination policy" -- *i.e.*, an enhanced service, when bundled with a basic service, "contaminates" the basic service, thereby rendering the bundled offering an enhanced service[74] -- within the statutory definitions of "information service" and "telecommunications service."

ASCENT submits that Congress did not so codify the Commission's "contamination policy" and, in fact, the better reading of the statute is that Congress rejected that approach -- a

---

[72] Id. at¶¶ 18 - 21.

[73] Id. at¶ 21.

[74] Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service (Memorandum Opinion and Order), 10 FCC Rcd. 13717 at ¶ 18.

reading which not only allows, but compels, the conclusion that an incumbent LEC when providing self-provisioned broadband Internet access service is providing both an information service and a telecommunications service to the end-user. As Senators Stevens and Burns advised the Commission after enactment of the Telecommunications Act, "Congress did not want to adopt the Commission's 'contamination' theory," and indeed, expressly struck language from the definition of "telecommunications service" to ensure this end.[75]

Simply because "information services" are provided "via telecommunications" does not mean that an incumbent LEC providing an end user with DSL connectivity is not providing a telecommunications service, as well as an information service, to that end user. When an end user accesses an incumbent LEC's Internet access service over a dial-up connection provided by the incumbent LEC, the incumbent LEC is providing a telecommunications service, as well as an information service, to the end user. Just as provision of a local loop with dial tone constitutes a telecommunications services in such an instance so too does DSL connectivity when provided to an end user as another means of accessing the Internet.

Similarly, simply because a telecommunications service does not change the form or content of information does not mean that an incumbent LEC providing an end user with DSL

---

[75] Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Senators Stevens and Burns, dated January 27, 1998 (*cited in* Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd. 11501 (1998)).

service as a means of accessing the Internet is not providing a telecommunications service as well as an information service. The Internet access service provides the enhanced capability, the DSL service is simply a transmission medium. Indeed, a different assessment produces absurd results.

Under the approach advocated by the *NPRM*, an incumbent LEC could provide the same DSL service to two end users, one of which also obtained Internet access service from the incumbent LEC and despite the fact that the transmission services were identical, a whole different regulatory scheme would result. An incumbent LEC could provide stand-alone DSL service to an end user on day one, and on day two also provide Internet access service, and arguably one regulatory regime would apply one day and another the next day even though the DSL service remained the same. But if that incumbent LEC elected to bill for the DSL service and Internet access service separately, the regulatory regime which applied on day one would continue, but it would be a different regulatory regime for a customer with separate bill than for a customer with a combined bill. Regulation which can be so easily manipulated provides no consistency, and is hence bound to produce arbitrary results.

Worse yet such regulation can be manipulated by the regulated entities to defeat the will of Congress and such a result is clearly intolerable. As Senators Stevens and Burns noted, "[a]ll of the central provisions of the Telecommunications Act are applicable to 'telecommunications carriers' and the provision of 'telecommunications services.' If these new definitions are construed very narrowly . . . than the 'major overhaul' of the Communications Act that Congress expected from the Telecommunications Act could turn out to be nothing more than a footnote in history."[76]

---

[76] Id.

Clearly, the fears of Senators Stevens and Burns will be realized if the Commission implements the definitions of “telecommunications services” and “information services” in such a way that incumbent LECs can readily avoid some or all of their Section 251 obligations.

VI. Conclusion.

By reason of the foregoing, the Association of Communications Enterprises urges the Commission, consistent with these comments, to adopt a statutory classification and a regulatory framework for self-provisioned incumbent LEC broadband Internet access services which will further the Congressional mandate to speed the availability of broadband services by fostering competition in the local exchange/exchange access market.

. Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By:______________/s/_________________________

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1424 Sixteenth Street, N.W.
Suite 105
Washington, D.C. 20036
(202) 293-2500

May 2, 2002 Its Attorneys